Supreme Court, U. S.
FILED
JUL 28 1975
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1598

ROBERT K. WEARY and DALE J. WEARY,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE TENTH CIRCUIT

MEMORANDUM FOR PETITIONER IN REPLY

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In his Memorandum in Opposition to the Petition for Certiorari, the Solicitor General has opposed the granting of the petition on the grounds that the petition was filed a day late and that the time limit specified in 28 U.S.C.A. 2101(c) is jurisdictional. No authority was cited for this position, the Solicitor apparently relying on the language of the statute itself.

Under previous statutory provisions, the Supreme Court has so held. *Toledo Scale Co.* v. *Computing Scale Co.*, 1922, 261 U.S. 399, 67 L.Ed. 719. However, the statute then provided as follows (Fed. Stat. Anno. Supp. 1918, p. 422):

> "That no writ of error, appeal, or writ of certiorari intended to bring up any cause for review by the Supreme Court shall be allowed or entertained unless duly applied for within three months after entry of the judgment or decree complained of."

This statutory provision clearly made timely filing jurisdictional.

The present statute, however, reads as follows:

> (c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

While this statutory provision could be construed as making a timely filing of the petition jurisdictional, it does not expressly so provide and in view of the change in the statutory language, the petitioner believes it should not be so construed.

Furthermore, since the granting of a writ of certiorari is a matter that rests in the Court's discretion anyway, there really is no sensible reason for holding that the timely filing is jurisdictional. Thus, the delay in filing could certainly be taken into account in determining

whether the petition should be granted or denied. Compare *Pittsburg Towing Co.* v. *Mississippi Valley Barge Line Co.*, 1966, 385 U.S. 32, 17 L.Ed.2d 31; *Johnson* v. *Florida*, 1968, 391 U.S. 596, 20 L.Ed.2d 838; *Communist Party of Indiana* v. *Edgar D. Whitcomb*, 1974, 414 U.S. 441, 38 L.Ed.2d 635, holding timely docketing not to be jurisdictional in the case of an appeal.

The rule contended for by the Solicitor could be extremely arbitrary and harsh in application. In recent years many problems have developed in the regular and orderly delivery of mail. It could well be that a petitioner could mail his petition to the Court for docketing well within time and the petition become lost in the mails with the petitioner not finding out that it had been lost until after time for docketing of the petition had passed. In this situation, if the Solicitor's argument was accepted, there is no way the petitioner could possibly protect himself. Such a harsh rule, where the writ is discretionary in nature in any event, seems difficult to justify.

There seems little point in excuses. Petitioner had thought the petition would be docketed in time. If timely filing is jurisdictional, there would appear to be little petitioner or the Court can do about the matter. All petitioner can say is that it certainly underscores the problems the average citizen has in dealing with this massive government of ours, if he feels aggrieved with respect to income tax matters, a matter that affects everyone. In three short lines the Solicitor avoids dealing with the merits of the matter. Such a result is depressing, to say the least.

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July, 1975.